Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT DOWNS,

Petitioner,

versus

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May teachers display racial slurs, nudity and pornography solicited from political advocacy groups, non-employees and students, and be insulated from viewpoint neutrality and forum analysis because the materials appear in extra-curricular displays?

2. May teachers solicit political advocacy groups, non-employees and students to display materials in extra-curricular displays which agree with the teachers' viewpoint on an invited subject matter while censoring materials which do not agree with the teachers' viewpoint on the invited subject matter when the school's legal counsel and Policy state that all viewpoints should be expressed?

3. Does a principal violate the First Amendment when the school's legal counsel initially confirms Petitioner may display his viewpoint pursuant to the school's Policy but then censors Petitioner's viewpoint in extra-curricular displays merely because a few employees expressed an offense to some of Petitioner's display?

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The panel opinion of the United States Court of Appeals for the Ninth Circuit in *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000), was entered on September 7, 2000, and is reproduced as Appendix ("App.") A hereto. The opinion of the United States District Court for the Central District of California was entered on September 20, 1999, is not reported and is set forth as Appendix B hereto. The opinion of the United States Court of Appeals for the Ninth Circuit denying rehearing *en banc* was entered on October 20, 2000, is not reported and is reproduced as Appendix C hereto.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on September 7, 2000. The United States Court of Appeals for the Ninth Circuit entered its opinion denying rehearing *en banc* on October 18, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days from that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution, Amendment XIV, Section 1:

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act, 42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

1. The Petitioner.

Petitioner, Robert Downs, is a tenured teacher at Diane S. Leichman High School in the Los Angeles Unified School District. Petitioner's Principal in 1997, Ms. Donna Olmsted, testified Petitioner has "a very good reputation." Ms. Olmsted

testified that Petitioner "was a very fair person. He was Chapter Chair ... and he seemed to be very logical, very fair with how he dealt with employees and certainly how he dealt with me." Even the homosexual teachers at Petitioner's school that opposed his viewpoint testified that Petitioner is considered a friend and they have a good working relationship. Petitioner's good working relationship with other homosexual teachers continued even after Petitioner's display was created.

2. The Displays of Racial Slurs, Nudity and Pornography.

On April 11, 1997, Respondent promulgated Memorandum No. 111, Gay And Lesbian Awareness Month (hereinafter "Memo 111"). Memo 111 states that: "On May 18, 1992, the Board of Education passed the first resolution designating June of each year as a time to focus on gay and lesbian issues." Pursuant to Memo 111, administrators, teachers, staff, non-employees, parents, students and outside political advocacy groups were solicited to create displays such as Interview with a Rapper stating:

> 'What kind of advice would you give to young brothers and sisters and artists who are struggling with their personal lives?' . . . 'There are a lotta people out there who will judge you on the merits of what you do in your bed, but fucking a girl do not make you a man. . . Though I have not told half of the shit . . . . the jig is up and those closet doors are gonna get kicked open.' . . . Let's not forget that he also revealed the drug usage as a way to forget the fact that only a man can satisfy another man and the fact that the 'secret fraternity' is larger than we all think. . . Lesbians and homosexuals are everywhere, so why not in hip hop? . . . Even when a nigga gets put on . . . . You see by fuckin a nigga in

his ass and letting him suck your joint, thus turning him out.. . . Niggas get hooked on that ass which now makes them bonafied (pardon my bone joke) homosexuals. Even with all the money and the ladies a nigga still craves another niggas ass!! . . . Then there is the 'born gay' hip hop niggas. They do not need to be bribed, they were just born to love it. . . but honey don't believe the hype cause niggas are trickin for niggas in the gay community and with his jeans hingin on his ass, timbos and all the sized gear is called a banji boy (B-Boy). . . . B-boy niggas represent to the fullest. You would never know they were gay 'cause they are always talkin bout knockin niggas out, fuckin women, gettin high and making money. . . . 'No Wendy, he fucked my friend last weekend!' . . . fuckin jokes . . . from all the dick that she is sucked . . . . 'Cause I learned the hard way that niggas do not think that I can be hard and true to my craft if I am putting a dick in my mouth. Yo, I am just as well as any motherfucker out there. . . . My shit is as real as it can be. . . . but nobody is really listening to what the fuck is going on'. . . . I am remembering the time I was playing my junior high school buddy, Terrance, and we began experiencing things with each other that I'd rather not talk about now. . . . So back to his mate: 'Are you still together?' 'Yeah, me and my boy are living happily ever after and all that shit. . . . He comes with me to the studio when I am working on my album or when I am producing someone else's shit. It is the best shit. He holds me and takes care of me when I'm sick and rubs my back when I've had a rough day and shit. . . .' 'What kind of man turns you on?' . . . . 'I need a ruff-neck brother to satisfy me.' I can't help but smile to myself. He returns the smile. . . my heart skips a few beats and I try to imagine what his mate looks like. . . . Just because he

has sex with other men instead of women does not mean that he does not carry a 9 and is not well versed in its use. . . .Mess around or gay?'

Displays also contained materials from outside political advocacy groups stating: "God approves of gays and lesbians." A document titled Is Homosexuality A Sin? was displayed by Respondent and is recommended in Respondent's Project 10 Handbook as a resource for in-service training about religious viewpoints on gay and lesbian issues. Those people who selected it could ... take a salary point credit, and [the Project 10 Handbook] was distributed at those workshops...." Is Homosexuality A Sin? quotes numerous Biblical references and summarizes the views of religious authorities from various faiths and states: "In your opinion, does God regard homosexuality as a sin?" "God does not regard homosexuality as a sin"; "In your opinion, do the Scriptures object to homosexuality?" "God approves of gays and lesbians...." Respondent adopted Project 10 in 1984. Respondent also displayed Project 10 Is Here stating: "The truth shall make you free. John 8:32."

A display titled Family Pride stated: "The love affair of this Biblical hero, poet, and king [David] and his lover Jonathan, son of Saul, is celebrated in many of the Psalms he wrote. Denied and ignored for centuries by Christians and Jews alike, the intensity of their gay love still shines out: 'My brother Jonathan, thy love to me was wonderful, passing the love of women.' (2 Samuel 1:20)." Respondent also displayed Abraham Lincoln's Love for Joshua Fry stating: "Lincoln had a four-year love affair with his boyfriend Joshua Speed and other times in his life had occasional male-to-male liaisons."

Displays included materials from outside political advocacy groups which referred to heterosexuals as "homophobic," "the enemy," "bigots," "breeders," "child molesters," "neurotic,"

"threats to human survival," "natzis," "fascists," and "judgmental." Many displays contained full frontal male and female nudity, erotic and sensual photographs of male-on-male and female-on-female sexual acts along with invitations to gay bars and solicitations for students to exchange companionship for room and board. Obviously these materials do not pertain to legitimate pedagogical concerns and, in fact, they violate the school's duty to protect students from exposure to such materials. Because these materials have nothing to do with legitimate pedagogy, they are speech in the truest sense. For this reason, Respondent specifically disavowed much of this speech.

3. The Policy.

In 1997, Ms. Olmsted specifically stated in writing that Petitioner had permission to create a display expressing his viewpoint on gay and lesbian issues because Respondent's Policy is to allow all viewpoints to be expressed. Ms. Olmsted testified that she had contacted Respondent's legal office and was directed to give Petitioner permission to express his viewpoint in his display. Respondent's legal counsel also stated that it is Respondent's Policy that no one needs approval to express a viewpoint in the school's displays.

> THE COURT: So do you deny Downs had to get pre-approval for what he put on the bulletin boards?
>
> MR. MELENDEZ: No one had to get pre-approval.

Although Petitioner did not need pre-approval to express his viewpoint, he specifically asked for permission because he wanted to add balance to the viewpoint being expressed by others who were creating their own displays. Ms. Olmsted testified that she spoke with Respondent's legal counsel and was told that Petitioner could create a display expressing his

viewpoint on gay and lesbian issues. Ms. Olmsted testified that following her conversation with Respondent's legal office she told Petitioner it "was fine to present different viewpoints. Because the purpose of the month or of that period of time was to celebrate diversity and act as an awareness – you know, informational awareness period of time."

4. The Objections.

A few homosexual teachers objected to Petitioner's display, however, so Ms. Olmsted removed some of Petitioner's material. Ms. Olmsted testified that if Petitioner's display had not offended anyone, she would have allowed it to remain. Ms. Olmsted testified that the only objections came from homosexual teachers who had created their own display. Ms. Olmsted testified that she did not remove Petitioner's entire display because she "did not feel that all of it was offensive, necessarily." Ms. Olmsted testified she did not remove the remaining material because "on the face of it, on those materials, the words themselves were not objectionable, I guess, is the best word." However, a homosexual teacher then complained about the remaining material. Ms. Olmsted then sent a memorandum to Petitioner threatening that he may be subject to disciplinary action if he did not remove the remaining material. Although some heterosexuals also complained about the homosexual's display, Ms. Olmsted stated the display would remain posted and that anyone who was offended should walk down another hallway to avoid seeing the display.

In 1997, Petitioner's display contained School District memoranda (including a letter signed by Ms. Olmsted), summaries from the U.S. Office for Civil Rights, a portion of the Declaration of Independence, and articles from major newspapers similar to those displayed on the homosexual teachers' display.

In 1998, Petitioner was again given specific permission to create a display expressing his viewpoint on gay and lesbian issues. As before, Petitioner's materials were posted without prior review. As in 1997, a teacher complained about Petitioner's viewpoint. The teacher complained to the new Principal, Mr. Marino, that some of Petitioner's display offended him. The teacher also testified he was not offended by Petitioner's entire display. Mr. Marino testified that if Petitioner's display included what the homosexual teacher believed to be a homosexual family, Petitioner's display would be acceptable and would not be removed. In deciding whether Petitioner's display was acceptable, Mr. Marino testified his determination would be based upon his subjective opinion of whether anyone might be offended. Mr. Marino testified that even if people were offended by the homosexuals' display, all those materials would remain displayed. Mr. Marino testified that he sent a memorandum to Petitioner demanding that the entire display be removed because a few homosexual teachers had complained. Mr. Marino testified that the only objections came from the homosexuals who created their own display.

In 1998, Petitioner's display contrasted the homosexuals' display and the homosexuals' proposed alteration of the definition of family with that of the traditional family by identifying the physical, legal, moral, and social differences between the two entities, and referencing recent legislation and litigation involving these issues. Also included were references to California Board of Education's instructions regarding the importance of balanced presentation in the schools with excerpts entitled "freedom and autonomy," "freedom of expression," etc. Petitioner only included materials which were either identical or analogous to materials on other displays which remained during Gay and Lesbian Pride Month. The Bible verses and statistics which Petitioner included are used elsewhere in Respondent's displays and even included in its curricular materials.

5. The Non-Government Speech in Displays.

Respondent's Policy permits displays to be used throughout the year for social issues even if the material is not created, approved, or distributed by Respondent. Both Ms. Olmsted and Mr. Marino testified that they allow displays for social issues even if the material is not created, approved, or distributed by Respondent. Ms. Olmsted testified that at "various times" she allowed people to create displays with materials that were not created, approved, or distributed by Respondent. Ms. Olmsted testified that in 1997 she allowed Ms. Judy Scheuer to display materials related to the "Pennies for the Planet" campaign which were Ms. Scheuer's personal materials. Ms. Olmsted also testified that she allowed Ms. Judy Hicks to display personal materials that same year. In both cases, Respondent had not created, approved, or distributed the materials.

Mr. Marino testified that he allows displays for social issues even if the materials are not created, approved or distributed by Respondent. Respondent admits that numerous persons were permitted to display materials which were not created, approved, or distributed by Respondent; and none of those materials were "official school district communications."

6. The Displays' Extra-Curricular Uses.

In relation to the displays created pursuant to Memo 111, Respondent's counsel stated that the displays are extra-curricular activity.

> THE COURT: So you argue that *Hazelwood* - - we're not talking about the makeup of a curriculum for algebra or history. We're talking about a school newspaper which is sort of an extra-curricular type of activity. And this falls in the same genre?

MR. MELENDEZ: That's correct, your Honor.

A teacher at Petitioner's school testified that there are no sex education classes being taught at the school; and no curriculum has ever been offered at Petitioner's school related to the displays authorized by Memo 111. Memo 111 states that Respondent began Gay and Lesbian Pride Month in June 1992. The person initially responsible for Gay and Lesbian Pride Month, Ms. Laura Hale, testified that she never developed curriculum related to Gay and Lesbian Pride Month throughout the beginning years when displays were created. Although Ms. Hale testified that she began creating displays in 1992, Respondent officially states that it began allowing persons to post materials for Gay and Lesbian Pride Month in June 1993 – long before any curriculum was even created.

When some curriculum materials were later created, Respondent's then Director of Project 10, Virginia Uribe, created the curriculum with the express instruction in lesson plans that all viewpoints should be expressed in the curriculum. Virginia Uribe testified that differing viewpoints are invited into the lesson plan curriculum. She testified that, "One of the objectives of this lesson plan would be to increase people's, students', and any adults' present awareness of the various views surrounding the topic of homosexuality." Virginia Uribe testified that "one of the objectives of this lesson [is] to provide students with different points of view."

7. The Solicitation for Outside Political Advocacy Groups, Students, and Non-Employees to Display Non-Government Speech in Displays.

Pursuant to Memo 111, Respondent allows full access to displays from "whoever" may want to display materials. Virginia

Uribe testified that Respondent has "an informal offer to have students and staff and whoever else bring things in from outside and put them up on the displays." Virginia Uribe testified that she had solicited both students and outside political groups for materials to be posted on Respondent's displays and, in fact, such materials had been displayed.

Both Ms. Hale and Ms. Kathy Gill testified that outside political organizations were solicited to provide materials to be posted on Respondent's display and, in fact, such materials had been displayed. The viewpoints of these outside political advocacy groups were displayed although no curriculum even existed and none of these materials were created, approved or distributed by Respondent. Gail Rolf, Respondent's current Project 10 Director, testified that she had solicited both students and outside political advocacy groups for materials to be posted on Respondent's displays and, in fact, such materials had been displayed. Ms. Rolf testified that she had personal knowledge that "they [the students] have a display case up this year [1999] that the kids put up." Ms. Rolf also testified that in 1998 student-created articles were displayed.

Q Let's talk about what was posted in '98 in that display case by you for Gay and Lesbian Awareness Month. Would it be the same materials we have already said?

A Yes, similar materials, and I know with certainty we had student produced materials where we drew things and wrote things on the cards that I had mentioned before. For instance, "I am proud to be gay" would have been the type of thing.

Q Students who are saying --

A That the student is proud.

Q All right. Anything else the students produced?

A Well, there were -- I can't tell you exactly what was said on the cards, but –
Q Okay. I know. There were various cards, then?
A Yes.
Q About how many, do you think?
A We put some up, took some down, so all the kids could get theirs. Maybe altogether ten, ten cards during that time.

Respondent admits that non-employees were permitted to post their personal materials which were not created, approved, or distributed by Respondent. In 1995 and in 1996, a non-employee, Ms. Kathy Oblek, was permitted to display materials which were not created, approved, or distributed by Respondent. Ms. Oblek is not an employee of Respondent, but was allowed to bring in her own materials for display. Respondent admits that none of the materials displayed by the outside political advocacy groups, students, and non-employees were "official school communications" which were created, approved, or distributed by Respondent.

Although Respondent initially stated its Policy allows all viewpoints to be expressed, Respondent later asserted that no person or group (students, teachers, staff or any other group) may express a viewpoint that offends the homosexual viewpoint. Respondent's Multi-cultural Director, Evangelina Stockwell, testified that "tolerance is not a two-way street." Ms. Stockwell testified that all people must agree with Respondent and any person who disagrees must keep silent. Any person who expresses a contrary viewpoint either verbally or in the distribution of materials is subject to sanctions including suspension and expulsion from school. Ms. Stockwell further testified that any viewpoint that disagrees with Respondent may not be expressed by anyone, even in casual conversation between two people in the hallway.

REASONS FOR GRANTING THE WRIT

I.
THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

A. The Decision Below Conflicts with this Court's Decisions in *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

1. The Panel Distinguished *Rosenberger* Based Upon Two Errors.

In *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995), this Court held that government may not engage in viewpoint discrimination. In *Rosenberger*, this Court held that in determining whether the government is acting to preserve the limits of forum it has created so that the exclusion of a class of speech is legitimate, there must be a distinction between content discrimination, which may be permissible, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. This Court further noted that "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech which is controlled by different principles." *Id.* at 834.

In *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000), the panel determined that *Rosenberger* was distinguishable for two reasons.

> Downs, of course, is correct in his argument that his postings "focused on gay and lesbian issues," as contemplated by Memorandum No. 111. If we myopically limited Memorandum No. 111's message to that phrase, we might agree with Downs that this case would be indistinguishable from *Rosenberger [v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)], as inviting a myriad of viewpoints on a single topic of discussion, and thus requiring forum analysis.

App. 24.

In *Downs*, the panel held that, "Premised on our conclusion that the bulletin boards contained only 'government speech,' we conclude that Downs had no First Amendment right to dictate or to contribute to the content of that speech." App. 11. The panel reached the conclusion that the displays "contained only government speech" based upon two significant errors: 1) although the materials on display came from numerous sources such as student-written articles, non-employees and outside political advocacy groups and were not created, approved, or distributed by Respondent, the panel mistakenly held that only school faculty and staff had access to the displays; and, 2) although Respondent argued that much of the speech on display was not its speech, the panel mistakenly held that Respondent did not disavow the speech on the displays. The panel failed to note Respondent's agents' testimony that the Policy applies to all speakers – students, teachers, and staff – not simply to Respondent's employees.

a. The Solicitation of Materials from Outside Political Advocacy Groups, Students, and Non-Employees Made the School Faculty and Staff Agents for Non-Government Speech in the Displays.

First, the panel deviated from this Court's holding in *Rosenberger* because it attributed all the speech that appeared on the bulletin boards to Respondent even when the faculty and staff testified that they posted the speech they had "solicited" from numerous students and outside political advocacy groups. The panel held:

> Only school faculty and staff had access to post materials on these boards. While these faculty and staff members may have received materials from outside organizations, the faculty and staff members alone posted material on the bulletin boards, and at all times their postings were subject to the oversight of the school principals

App. 16 (emphasis added).

In preparing the displays, the school faculty and staff testified that they "solicited" outside political advocacy groups for materials to be included in the displays. The school faculty and staff also testified that they were members of many of the outside political advocacy groups and attended meetings and conventions to acquire materials for the displays. In *Rosenberger*, this Court made clear that "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates...." *Id.* at 834. In this case, Respondent is

merely facilitating the speech of private persons – students and outside political advocacy groups.

Throughout the litigation and at oral argument, Petitioner affirmed that if the speech was merely the government's speech (*i.e.* speech created and distributed by Respondent) Petitioner would not be seeking equal opportunity to express his viewpoint. However, because Respondent's Policy is to allow various viewpoints and because teachers and staff "solicited" and displayed materials as agents for outside political advocacy groups, Petitioner argued that the speech was not really the government's speech but was the speech of the outside political advocacy groups. As in *Rosenberger*, Petitioner argued the displays are limited public fora that have been opened to support the expressive activities of certain groups speaking about certain topics. *See id.* at 829.

The evidence is that students created their own displays. Rather than using the materials created and distributed by Respondent, they created their own materials using their own words and thoughts and brought in materials from outside political advocacy groups. Despite this clear evidence, the panel held that:

> Because the school district and the school board were in fact responsible for 1) the recognition of Gay and Lesbian Awareness month and 2) the content of the bulletin boards through school principals' oversight, this case is clearly distinguishable from cases involving student-written articles in a school-sponsored newspaper or an outside organization's advertisements in school-sponsored student newspapers, yearbooks, and athletic programs.

App. 18.

The two factors cited by the panel are indistinguishable from this Court's decision in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, this Court recognized that the school district and the school board were in fact responsible for: 1) the school newspaper which was operated pursuant to the school's policies; and, 2) the content of the school's newspaper through the school principal's oversight. *Id.* at 268 - 269. In *Santa Fe Independent School Dist. v. Doe*, 120 S.Ct. 2266, 2276 (2000), this Court noted with fine distinction that not all speech that occurs on government property is the government's speech. "These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech." *Id.* at 2275 (*citing Rosenberger*, 515 U.S. 819). As noted in *Rosenberger*, the "need for careful judgment and fine distinctions presents itself even in extreme cases." *Rosenberger*, 515 U.S. at 848 (*citing Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947)).

Respondent explicitly stated that both of the *Hazelwood* factors are true in this case. Respondent argued throughout this case that *Hazelwood* is the proper standard and that it could not engage in viewpoint discrimination. In arguing *Hazelwood*, Respondent contended that the forum was non-public, but that there was simply no evidence that it had engaged in viewpoint discrimination. At no time has Respondent ever submitted one statement that it was engaging in "government speech" not subject to viewpoint neutrality or forum analysis. The district court accepted Respondent's position and ruled that there was no evidence of viewpoint discrimination. App. 44. The district court held that *"Hazelwood* Applies to This Case" (App. 38) while also stating the law was unclear regarding a school's

ability to engage in viewpoint discrimination. App. 43. The district court declined to follow the controlling Ninth Circuit case, *Planned Parenthood of Southern Nevada, Inc., v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991) (*en banc*); and a conflicting Eleventh Circuit decision, *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (holding that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.").

Despite Respondent's clear statements in both the district court and the appeals court that *Hazelwood* should be applied, the panel rejected Respondent's defense and held that, "This case is not controlled by *Hazelwood* or *Planned Parenthood* because it is a case of the government itself speaking, whether the government is characterized as Leichman High, LAUSD, or the school board." App. 16.

The panel also incorrectly relies on this Court's opinion in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), noting that because Respondent makes viewpoint determinations when granting or denying speech it is exempt from forum analysis. The policy being challenged in *Finley* was of a different character than the Policy being challenged in this case. In *Finley*, this Court was considering a facial challenge to the NEA's "decency" criterion. *See id.* at 2175, 2178. In *Finley*, this Court explicitly pointed out that it was not considering "a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination" because the litigants had brought a facial challenge. *See id.* at 2178. As this Court explained in *Finley*, "we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 2179. In this case, however, Respondent's Policy has changed during litigation from initially permitting various viewpoints to the

point of excluding contrary viewpoints that offend people in agreement with the government's viewpoint. These factors make this case more like *Rosenberger* than like *Finley*.

In *Bryant v. Secretary of the Army*, 862 F. Supp. 574, 580-81 (D.D.C.1994), an employee of the Army desired to publish letters in the Army's newspaper urging the Army to accept homosexuals in active duty service. The Army adopted a policy regulating submissions to newspapers under its control which stated that: "Commentaries and editorials may not extend to material not in consonance with policies of the Department of the Army." *Id.* at 580. After recognizing this Court's instruction in *Goldman v. Weinberger*, 475 U.S. 503 (1986), that deference should be given to military decisions regulating the conduct of its personnel, the court made the distinction between government speech and private speech that appeared in government-sponsored newspapers based upon the government's policy of accepting materials submitted from outside sources. "Although it may be true that the editorial content of the CENs [Civilian Enterprise Newspapers] is used by the Army to facilitate the mission of a particular command or installation, and that the Court should not 'second-guess' the military's determination as to what information best meets the command information objectives, this argument cannot be extended to cover a 'letters to the editor' feature in such publications." *Id.* at 580.

The Army's stated policy was "to facilitate the military mission, improve morale, increase effectiveness, and provide the commander with a primary means of communicating essential information -- all of which mandate in favor of greater judicial deference to AR 360-81." *Id.* at 580. The court drew the fine line of determining that "to the limited extent that AR 360-81 permits viewpoint-based discrimination, the Court finds that even the deference owed to military regulations cannot justify upholding what the Court deems a facial violation of the First

Amendment." *Id.* at 578. The court rejected the Army's argument that the regulation was immune from First Amendment challenges, noting that it was not the government's speech. "The Court thus finds that AR 360-81 is not addressed solely to the Government's role as speaker, but rather touches upon instances in which the Government is seeking to regulate speech." *Id.* at 580-581.

If the panel opinion stands, government entities across our country may enact policies inviting outside political advocacy groups into the government's forum to express a viewpoint the government agrees with while rejecting any contrary viewpoint. Although the government may speak on any given topic without opening the forum, this Court has consistently held that when the government invites outside groups to express one viewpoint on a subject matter, it must also allow other viewpoints on the same subject matter. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985).

b. Respondent's Explicit Statements Disavowing the Materials from Outside Political Advocacy Groups, Students, and Non-Employees Made the Speech Non-Government Speech.

Second, the panel deviated from this Court's holding in *Rosenberger* because it attributed all the speech that appeared on the bulletin boards to Respondent even when Respondent specifically disavowed much of the speech. Respondent argued that some of the speech was its own, but much of the speech was not. Because most of the materials have nothing to do with legitimate pedagogy, they are speech in the truest sense. For this reason, Respondent specifically stated the speech was not its own. In Respondent's Answer Brief, Respondent stated:

> The Statement of the Case portion of [Petitioner] Plaintiff's brief includes irrelevant material obviously meant only to shock the Court. The excessive quotations on pages 4 - 11 were taken from inside pages of publications provided to [Petitioner] Plaintiff in response to his overly broad request for production of documents from the [Respondent] District and that had no relation with the instant matter. Obviously, this type of materials [sic] was not part of District-approved materials, nor was any of this material displayed or even on site at Leichman.

Respondent's Answer Brief expressly and directly states that the materials displayed by the outside political advocacy groups, students, and non-employees were not "part of District-approved materials" which were created, approved, or distributed by Respondent. Respondent consistently stated throughout the case below that they permitted numerous outside political advocacy groups, students, and non-employees to display materials not "part of District-approved materials" which were created, approved, or distributed by Respondent.

In departing from the clear record in order to distinguish this case from *Rosenberger*, the panel held that there was no evidence that Respondent disavowed the speech appearing in the displays.

> Furthermore, unlike the University of Virginia in *Rosenberger*, there is no evidence that [Respondent] LAUSD made an affirmative effort to disclaim responsibility for the content of the bulletin boards. *See* 515 U.S. at 834-35, 115 S.Ct. 2510 ("The distinction between the University's own favored message and the private speech of students is evident in the case before us.... The University declares that the student groups eligible for [Student Activity Fund]

> support are not the University's agents, are not subject to its control, and are not its responsibility.").

App. 19.

Although Respondent admitted that much of the speech was not its own, Respondent also contradicts itself by stating that, "The excessive quotations on pages 4 - 11 were taken from inside pages of publications provided to [Petitioner] Plaintiff in response to his overly broad request for production of documents from the [Respondent] District and that had no relation with the instant matter." The quotations of the racial slurs and sexual acts described in displays such as Interview with a Rapper, *supra*, were single sheet pages displayed in full view to Respondent's middle school students. These materials were provided only after the district court compelled Respondent to respond to discovery after what the district court determined was "stonewalling" Petitioner's discovery efforts by falsifying answers to an earlier request for production.

Prior to the revelation of the outside materials, Respondent defended its actions by claiming all the materials were "district-approved." Following the district court's order to produce these materials, Respondent changed its defense to disavow the materials. As in *Rosenberger*, Respondent explicitly claimed it had no responsibility for student-written materials or the materials produced by outside political advocacy groups. In *Rosenberger*, this Court made clear that "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates...." *Id.* at 834. In this case, Respondent is merely facilitating the speech of private persons. "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging.... Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." *Id.* at 847 (O'Connor, J., concurring).

2. Respondent's Policy Allows All Viewpoints Unless the Viewpoint Offends Someone Opposed to the Viewpoint.

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court upheld certain limitations on advocacy groups in the Combined Federal Campaign. Nevertheless, it added that: "The existence of reasonable grounds for limiting access to a nonpublic forum, ... will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Id.* at 811 (emphasis added). This Court remanded the case for further hearing on the issue of viewpoint discrimination. *Id.* at 813; *see also Air Line Pilots Ass'n, Intern. v. Dep't of Aviation of City of Chicago*, 45 F.3d 1144, 1154 (7th Cir. 1995) ("a court must examine the *actual* policy – as gleaned from the *consistent* practice with regard to various speakers").

In light of the evidence, the panel's distinction of this case from the holding in *Rosenberger* cannot stand. In *Rosenberger*, this Court held:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic

> perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831-32; *see also id.* at 847 (O'Connor, J., concurring).

As in this case, in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993), the government extended a benefit (access to school facilities) to a wide variety of social speech activity. Respondent admits that under its Policy it initially granted specific, written permission for Petitioner to create a display because he satisfied all neutral, generally applicable criteria for use of the display. Ms. Olmsted testified that she had contacted Respondent's legal office and was directed to give Petitioner permission to express his viewpoint in his display. Ms. Olmsted testified that following her conversation with Respondent's legal office she told Petitioner it "was fine to present different viewpoints. Because the purpose of the month or of that period of time was to celebrate diversity and act as an awareness – you know, informational awareness period of time." Ms. Olmsted testified that if Petitioner's display had not offended anyone, she would have allowed it to remain. Respondent states no reason for excluding Petitioner's materials other than the objections of others who created their own display with an opposite viewpoint. As held in *Lamb's Chapel*, that is viewpoint discrimination.

Respondent's official Policy of initial acceptance and later removal of Petitioner's materials merely because a few people objected is identical to the defendant's exclusion of a viewpoint deemed unacceptable as in *Lamb's Chapel*. In a unanimous judgment, this Court held that viewpoint discrimination occurs when a school permits property to be used for the presentation of all views about a social issue except a viewpoint the school dislikes. In a clear example of viewpoint discrimination,

Respondent not only invited speech on a subject matter, it also "solicited" viewpoints on that subject matter from a religious perspective as long as the viewpoint did not offend anyone. In *Lamb's Chapel*, the school allowed the Salvation Army Youth Band, the Hampton Valley Council of Churches, and a New Age religious group into the facility, but then excluded the group the school disliked.

In *National Gay Task Force v. Board of Educ. of the City of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir.1984), *aff'd* by an equally divided Court, 470 U.S. 903 (1985), the court held that "a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school." (*citing Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969)). In *Weaver v. Nebo School Dist.*, 29 F. Supp.2d 1279 (D. Utah 1998), the court held that a school's censorship of a lesbian teacher's speech amounted to viewpoint discrimination. Following *National Gay Task Force*, the court in *Weaver* held the standard is *Tinker*, not *Hazelwood*. *See id.* at 1285. As in this case, the school district in *Weaver* had a general policy relating to sexual orientation. "Indeed, the School District, via its Healthy Responsible Lifestyles Education policy, recognizes and encourages teachers to speak freely on issues concerning heterosexual lifestyles. (*See* policy at 1 (allowing the curriculum to include, among other things, information 'that promotes the importance of marriage and the family' and information that promotes 'sexual abstinence before marriage and fidelity within marriage.'))." 29 F. Supp.2d at 1283.

The *Weaver* court held that a school district's curriculum policy which prohibited pro-homosexual speech was unconstitutional. The panel does not address this conflict with *National Gay Task Force* and *Weaver*, but merely states that Petitioner's viewpoint is not permitted because his viewpoint

contradicts the curriculum. The panel appears to recognize this weakness by stating the opinion is not entirely based upon a curriculum analysis. "Whether or not the bulletin boards by themselves may be characterized as part of the school district's 'curriculum' is unimportant, because curriculum is only one outlet of a school district's expression of its policy." App. 27.

In this case, Respondent stated that use of the displays was an extra-curricular activity more like *Hazelwood*. Respondent agreed with the district court's finding that, "So you argue that *Hazelwood* - - we're not talking about the makeup of a curriculum for algebra or history. We're talking about a school newspaper which is sort of an extra-curricular type of activity. And this falls in the same genre?" Despite this evidence, the panel departed from the record by holding the displays were curriculum related. Even if true, Respondent's curriculum includes Petitioner's viewpoint. Respondent's then Director of Project 10, Virginia Uribe, created the curriculum with the express instruction in lesson plans that all viewpoints should be expressed in the curriculum. Virginia Uribe testified that differing viewpoints are invited into the lesson plan curriculum. She testified that, "One of the objectives of this lesson plan would be to increase people's, students', and any adults' present awareness of the various views surrounding the topic of homosexuality." Virginia Uribe testified that "one of the objectives of this lesson [is] to provide students with different points of view."

Most importantly, the panel also failed to note the evidence that no curriculum related to Gay and Lesbian Pride Month was ever offered at Petitioner's school. Rather, in Petitioner's school (as in many schools) displays were created without use of any supporting curriculum. Despite the evidence, the panel held that under the Educating for Diversity program only one viewpoint was permitted on the displays. This holding is in spite of

Respondent's admission that the curriculum includes all viewpoints on the subject matter.

The panel attempts to mitigate the harm of its error by asserting students and teachers may express a contrary viewpoint though other vehicles of expression. "Our holding, however, does not prevent Downs from propounding his own opinion on the morality of homosexuality. Subject to any applicable forum analysis, he may do so on the sidewalks, in the parks, through the chat-rooms, at his dinner table, and in countless other locations." App. 29. This is untrue. Respondent revised its Policy during the litigation to state that no person may express a contrary viewpoint whether it be verbally or through casual conversation between two persons in the hallway. Respondent's Multi-cultural Director, Evangelina Stockwell, testified that "tolerance is not a two-way street." Ms. Stockwell testified that all people must agree with Respondent and any person who disagrees must keep silent. Any person who expresses a contrary viewpoint either verbally or in the distribution of materials is subject to sanctions including suspension and expulsion from school. Ms. Stockwell further testified that any viewpoint that disagrees with Respondent may not be expressed by anyone, even in casual conversation between two people in the hallway. This Policy is based upon the concept of shielding any person from offensive speech whether it be verbal or in printed form.

The panel resolves this question by holding that in order for students or teachers to speak while on government property the speaker must survive the electoral process. This is significant because Respondent asserts the challenged Policy applies to all speakers -- students as well as all others. Misapplying this Court's opinion in *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the panel concluded, "In order for the speaker to have the opportunity to speak as the government, the speaker must gain

favor with the populace and survive the electoral process." App. 28.

The panel opinion allows the viewpoint of the majority sole expression by upholding a Policy silencing students and teachers with contrary a viewpoint. In *Southworth*, this Court explained why viewpoint discrimination based upon majority power is constitutionally problematic.

> To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.

Southworth, 120 S.Ct at 1357.

This principal was recently reaffirmed by this Court's decision in *Santa Fe Independent School Dist. v. Doe*, 120 S.Ct. 2266, 2276 (2000):

> Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the District's elections are insufficient safeguards of diverse student speech."

(Footnote omitted).

In this case, Respondent initially stated that use of the displays was an extra-curricular activity more like *Hazelwood* to which the court should apply viewpoint neutrality and forum analysis. After Respondent was compelled to produce the materials displaying racial slurs, nudity and pornographic materials solicited from political advocacy groups, non-employees and students, Respondent revised the litigation strategy to disavow the materials. At no time has Respondent ever contended the speech was government speech. Rather, the panel determined the speech is government speech which is insulated from viewpoint neutrality and the forum analysis. At a minimum, this Court should vacate the panel's decision and remand the case for trial.

This Court should grant the Petition in order to prevent a dangerous trend which is threatening our constitutional freedoms. Across the country, courts are confused about the application of the "government speech" principle and require direction and clarification from this Court. *See* 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 20.11, at 279 & n.2 (3d ed.1999) (noting scholarly work on the governmental speech question). The principle is especially confusing in cases such as this where the courts recognize the government solicited outside political advocacy groups for materials to create displays. Other courts have ruled that speech appearing in government-sponsored publications is not government speech. *Bryant v. Secretary of the Army*, 862 F. Supp. 574, 580-81 (D.D.C.1994) (finding that letters to editor published in military base newspaper "clearly d[id] not reflect government speech in any ordinary sense of the term" and thus Army's editorial regulation, which "touche[d] upon instances in which the Government is seeking to regulate speech," was not immunized from First Amendment challenges).

This Court should also resolve the important question of whether courts may ignore viewpoint neutrality and forum analysis in cases where the government facilitates the private speech of outside political advocacy groups. The panel decision creates a new standard which needs clarification from this high Court. In this case, the panel cited with approval the Eighth Circuit's opinion in *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094 n.11 (8th Cir.2000) (refusing to decide whether speech's status as "government speech" is enough to preclude forum analysis altogether), *cert. denied*, --- U.S. ----, 121 S.Ct. 49, --- L.Ed.2d ---- (2000).

CONCLUSION

FOR THESE REASONS, Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Robert DOWNS, Plaintiff-Appellant,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant-Appellee.

No. 99-56797.

Argued and Submitted June 6, 2000
Filed Sept. 7, 2000

Frederick H. Nelson, American Liberties Institute, Orlando, Florida, for the plaintiff-appellant.

Mary Kay Jackson, Office of the General Counsel, Los Angeles Unified School District, Los Angeles, California, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-98-09876-SVW.

Before: TROTT, FERNANDEZ, and McKEOWN, Circuit Judges.

TROTT, Circuit Judge:

The narrow question we must answer is whether the First Amendment compels a public high school to share the podium with a teacher with antagonistic and contrary views when the school speaks to its own constituents on the subject of how students should behave towards each other while in school. The answer to this question clearly is no.

Appellant Robert Downs is a teacher at Doris S. Leichman High School ("Leichman High"), a school within appellee Los Angeles Unified School District ("LAUSD"). Downs filed suit against LAUSD pursuant to 42 U.S.C. § 1983 and the United States and California Constitutions, seeking a permanent injunction, declaratory judgment, compensatory damages and attorneys' fees. In his lawsuit, Downs alleged that LAUSD, through its officers and employees, violated his constitutional right to freedom of speech by removing, and by asking Downs to remove, competing material that Downs had posted in the school in response to materials posted on bulletin boards set up by Leichman High staff members for the purpose of recognizing Gay and Lesbian Awareness Month.

The district court granted summary judgment in favor of LAUSD. On appeal, Downs argues that the district court improperly defined and characterized the forum to which he sought access, and thereby employed an incorrect legal standard in deciding the motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM the grant of summary judgment in LAUSD's favor, but on grounds slightly different from those relied on by the district court. *See Baker v. Liberty Mut. Ins. Co.*, 143 F.3d 1260, 1263 (9th Cir.1998) ("This court may affirm the summary judgment dismissal on any basis supported by the record.").

Factual Background

The facts of the case, presented in the light most favorable to Downs, *see Berry v. Valence Tech., Inc.*, 175

F.3d 699, 703 (9th Cir.), cert. denied, ___ U.S. ___, 120 S.Ct. 528, 145 L.Ed.2d 409 (1999), reveal that on April 11, 1997, LAUSD issued "Memorandum No. 111," titled "Gay and Lesbian Awareness Month," to all schools and offices in the school district. Memorandum No. 111 referred to a May 18, 1992, formal Board of Education resolution designating June of each year as "a time to focus on gay and lesbian issues." The Memorandum noted that the Board of Education's resolution was passed to support "Educating for Diversity." The Memorandum also specified that

> the District's multicultural and human relations education policy includes the expectations that: "Each student has equal access to a quality education and an opportunity to participate fully in the academic and social activities of the school," and "School policies and practices act to foster a climate that reduces fears related to difference and deters name-calling and acts of violence or threats motivated by hate and bigotry."

The Memorandum informed the schools and offices that the "Office of Intergroup Relations and the Multicultural Unit, Division of Instructional Services, and the Gay and Lesbian Education Commission" would provide posters and materials in support of Gay and Lesbian Awareness Month.

The posters and materials to be provided to the schools were designed to aid in "the elimination of hate and the creation of a safe school environment for all students." "In recognition that some of the materials can be controversial in nature," the Memorandum provided that "the representations on the posters" were reviewed by, among other groups, the "Parent Community Services

Branch." The Memorandum also "recognize[d] that schools are part of a community and must respect the sentiments held by the local community."

Pursuant to Memorandum No. 111 and the policies described therein, at some time in late May or early June 1997, some Leichman High staff members created a bulletin board inside the school building on which faculty and staff could post materials related to Gay and Lesbian Awareness Month in addition to the materials provided by the district office. Staff members created a similar board the following year. Materials did not need approval before posting on the Gay and Lesbian Awareness bulletin boards, but were subject to the oversight of the school principal, who had ultimate authority within the school over the content of the boards. This was the actual practice and policy at Leichman High. During the time period at issue in this case, there were two different principals at Leichman High: Donna Olmsted from January 1993 to June 1997, and Joseph Marino from July 1997 through at least the beginning of this litigation. As school principals, Olmsted and Marino were accountable to the school board, which itself is made up of publicly elected officials.

Materials posted by faculty and staff that Olmsted and Marino allowed to remain on the school's Gay and Lesbian Awareness bulletin boards covered a wide range of topics. They included a poster titled "The Civil Rights Movement;" a poster titled "Diversity is Beautiful;" a poster on Name Calling; a poster titled "What is a Family;" a bar/pie chart reflecting Statistics on Hate Crimes; a sheet of paper on "The Rainbow Flag;" a sheet of paper explaining the gay and lesbian symbols; a laminated felt

rainbow flag with the Greek letter Lambda; a newspaper article regarding LAUSD Board approval of domestic partner benefits; a Board resolution regarding discrimination; a Los Angeles County Human Relations Commission brochure regarding anti-gay and lesbian bashing; a statement that June is Gay and Lesbian Awareness/Pride month; a sheet of paper identifying famous gays and lesbians in history; a sheet of paper discussing the history of the pink triangle symbol; and a sheet of paper discussing the Lamda symbol. There is no evidence in the record that individuals other than faculty and staff at Leichman High posted these or any other materials on the school's Gay and Lesbian Awareness bulletin boards.

Downs objected to the recognition of Gay and Lesbian Awareness Month at Leichman High. In June of 1997, Downs created his own bulletin board across the hall from his classroom titled "Testing Tolerance." In June of 1998, in response to postings on other Gay and Lesbian Awareness bulletin boards within the school, Downs created a competing bulletin board titled "Redefining the Family." Included among the materials posted by Downs were a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and the following four separate excerpts:

> According to lesbian activist Tories Osborn, 60% of Americans hold the belief that homosexuality is immoral. Most mainline religions in America . . . condemn homosexual behavior.
>
> Do not lie with a man as one lies with a woman; that is detestable. Do not have sexual relations with an animal and defile yourself with it. A woman must not present herself to an animal to

> have sexual relations with it; that is a perversion. Do not defile yourselves in any of these ways because this is how the nations that I am going to drive out before you become defiled. Leviticus 18:22-24.
>
> Obviously and without contention the simultaneous stimulation and mutual satisfaction which the complementary anatomical structures and functioning of the procreative organs of the man and woman produce indicate that they are purposefully intended for one another. Procreation and thereby the proliferation of the human species are further confirmation that such unions are appropriate and natural. Beyond this, the various organs of the digestive and excretory systems can and have been used for similar gratification, but obviously these acts are different and can be objectively evaluated as such.
>
> Anti-sodomy laws in many states stand to prevent or at least complicate homosexual marriage and adoption . . . because . . . the United States Supreme Court upheld state authority to maintain laws prohibiting homosexual sodomy.

From the paltry record before us, we cannot discern when which particular materials were posted or taken down.[1] However, as will become clear from the body of

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[1] The parties' excerpts of record and the district court record provide remarkably little information regarding what exactly was posted on the bulletin boards at Leichman High. In creating the excerpts of record for appeal, it behooves parties to treat appellate panels not as if we were pigs sniffing for truffles, *see United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991), but instead to fill our troughs to the brim with the relevant, let alone necessary, information. Were we deciding this case under the

our opinion, such details ultimately prove to be irrelevant.

In both 1997 and 1998, after other faculty members complained, Olmsted and Marino either removed Downs's materials or ordered Downs to remove them himself. The record clearly demonstrates that Downs's materials were ordered to be removed in part because members of the school community deemed them "disrespectful," "offensive," "upsetting," "objectionable," and "derogatory." Marino testified that he considered Downs's material inconsistent with the purposes of the Gay and Lesbian Awareness month because he "did not see [Downs's] activity supporting tolerance [and] did not see [Downs's] material supporting diversity."

Leading up to the 1997 removal of Downs's materials, Olmsted, Downs, and LAUSD's counsel engaged in both a written and verbal dispute over the bulletin board issue. In a June 9, 1997 letter to Downs, Olmsted informed him that "[a]s long as you are employed by LA Unified and this Board policy [against discrimination on the grounds of sexual orientation] remains, this is the policy that you are expected to follow. If you worked for a private school, then this would not be the case." In the

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traditional rubric of "viewpoint neutrality," we would have little to base a reasoned decision upon. Our decision makes the substance of the posted materials largely irrelevant, but the parties had no reason to assume that this would be the case, considering that much of the argument in the district court and in the parties' appellate briefs focused upon viewpoint neutrality. We offer some discussion of the substance of the postings merely to contextualize the dispute involved in this case.

June 9 letter, Olmsted also reminded Downs of their earlier discussion in which she had told Downs that he could create a bulletin board with the understanding that he had "the right of free speech as an individual, providing you are not being discriminatory and providing you maintain the separation of church and state in your statements. This is one of our obligations as District employees."

In another letter written one week later, Olmsted informed Downs that she had removed "recently added items" from the bulletin board across from Downs's classroom because the items "have nothing to do with school work, student work or District approved information." Olmsted continued on to "advise" Downs that he should remove the remaining items on the board because "for the most part [they] have no connection to material that is District approved, school work or student work." The following month, LAUSD's legal counsel, Jesus Estrada-Melendez, wrote Downs to confirm an earlier conversation in which he had informed Downs that the bulletin boards were not "free speech zones," and that "[f]or this reason Ms. Olmsted as the principal of the school is the proper official to make certain thatthese boards are used appropriately."

New school Principal Marino followed this pattern of communication in 1998 with a Memorandum letter of his own. Marino wrote Downs on June 18, 1998, directing him to remove immediately all materials "related to the subject of 'Redefining the Family' " that were posted on the bulletin board across from Downs's classroom. In his letter, Marino noted that neither he nor the District had approved Downs's materials, that the materials were

"divisive and disrespectful of the rights of" several Leichman High staff, and that "[r]ecognition of Gay and Lesbian Awareness Month is an approved District activity and District approved materials are used on the bulletin board in the main hallway as part of the activities."

Procedural Background

In response to his perceived affront, Downs filed suit against LAUSD on November 30, 1998. On March 24, 1999, LAUSD moved for summary judgment. In response to this first motion for summary judgment, the district court concluded that Leichman High's bulletin boards constituted a nonpublic forum, and that the case fit within the "school-sponsored speech" rubric established by the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Working from that premise, the district court concluded that the applicable First Amendment test was whether LAUSD's actions were "reasonably related to legitimate pedagogical concerns," *see id.* at 273, 108 S.Ct. 562, but also found that the factual record was not developed enough at that time to rule in favor of LAUSD on summary judgment. The court denied LAUSD's motion.

Following some development of the record, the district court granted LAUSD's second motion for summary judgment, filed on July 1, 1999. The court reiterated its earlier legal conclusions regarding definition and characterization of the forum. In addition, the court determined that "tolerance" was a legitimate pedagogical concern, and that no reasonable fact-finder could find that LAUSD

"exceeded its broad discretion in implementing its legitimate pedagogical [sic] approach."

The court rejected Downs's argument that even under *Hazelwood*, a school's restrictions on speech "reasonably related to legitimate pedagogical concerns" must still be viewpoint-neutral. The court cited language in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), for the proposition that the Supreme Court "appear[ed] to have recognized [that] the traditional discussions of viewpoint discrimination do not fit well into the analysis of a school's decision to prohibit student or teacher speech related to the curriculum." The district court consequently held that "[j]ust as a school could prohibit a teacher from posting racist material on a bulletin board designated for Black History Month, [LAUSD] may prohibit [Downs] from posting intolerant materials during 'Gay and Lesbian Awareness Month.' " Finally, the court indicated, in dicta, its belief that even if viewpoint-neutrality principles were implicated in the case, LAUSD had not "advanced" the gay and lesbian lifestyle, but had instead engaged in the legitimate pedagogical interest of teaching tolerance.

Discussion

We review a grant of summary judgment de novo. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), cert. denied, 528 U.S. 952, 120 S.Ct. 375, 145 L.Ed.2d 293 (1999). We must determine, viewing the evidence in the light most favorable to Downs, whether there are any genuine issues of material fact and whether the district court correctly

applied the relevant substantive law. *Berry*, 175 F.3d at 703.

In order to decide whether the district court applied the substantive law to Downs's claim correctly, we must decide whether his postings on Leichman High's bulletin boards warranted any First Amendment protection. If so, we would have to assess what type of protection the First Amendment provides and whether LAUSD deprived Downs of that protection. Premised on our conclusion that the bulletin boards contained only "government speech," we conclude that Downs had no First Amendment right to dictate or to contribute to the content of that speech. Thus, LAUSD did not act unconstitutionally in removing Downs's materials or in ordering that the materials be removed. In summary, the district court's analysis of the issue it addressed was correct.

A. Whose Speech Was It?

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. When an individual speaks, the government's ability to regulate that speech depends in some situations on the designation of the forum in which the individual chooses to speak. *See*, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir.1999), cert. denied, ___ U.S. ___, 120 S.Ct. 1674, 146 L.Ed.2d 483 (2000). The two cases most closely related to our case that have developed this principle in a school setting are *Hazelwood and Planned Parenthood v. Clark County School*

District, 941 F.2d 817 (9th Cir.1991) (en banc). Notwithstanding that those two cases help frame our discussion, we begin our analysis by explaining why they do not ultimately dictate our decision.

Although "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate," *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506-07, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), where that speech or expression begins to implicate the school as speaker, First Amendment rights have been limited. *See*, e.g., *Hazelwood*, 484 U.S. at 270-73, 108 S.Ct. 562 (dealing specifically with student speech); *Planned Parenthood*, 941 F.2d at 828-29 (outside organization's attempt to advertise in school publications); *see* also *DiLoreto*, 196 F.3d at 969 n. 5 ("The Supreme Court has made clear that the question whether the First Amendment requires a school to tolerate certain speech, such as the speech of students, is different from the question whether the First Amendment requires a school to promote or endorse another's speech."). Cases have identified this lesser-protected type of speech as "school-sponsored speech" or speech that will likely bear the "imprimatur" of the school. *Hazelwood* and *Planned Parenthood* are the two foremost examples of cases drawing this distinction.

In *Hazelwood*, a high school principal removed from a school newspaper two pages containing an article describing some of the school's students' experiences with pregnancy and an article discussing the impact of divorce on a number of the school's students. 484 U.S. at 263, 108 S.Ct. 562. After concluding that the school newspaper was a nonpublic forum, the Court determined that

school officials could regulate the newspaper's contents in "any reasonable manner." *Id.* at 270, 108 S.Ct. 562. The Court then distinguished between toleration of student speech – addressed in Tinker – and the affirmative or perceived promotion or sponsorship of student speech. *Id.* at 270-71, 108 S.Ct. 562. "The latter question," the Court wrote

> concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. at 271, 108 S.Ct. 562. The Court determined that educators' authority in this area enabled them to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.*

Pursuant to this analysis, the *Hazelwood* Court declared that a school may "disassociate itself . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* (internal quotations and citations omitted). In addition, schools

> retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.

Id. at 272, 108 S.Ct. 562 (internal quotations and citations omitted). The school principal's actions in *Hazelwood* survived constitutional scrutiny because his "editorial control over the style and content of student speech in school-sponsored expressive activities [was] reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. The Court indicated that the same principles would govern a school's ability to regulate a teacher's speech that might be seen to bear the imprimatur of the school. *Id.* at 267, 108 S.Ct. 562; *see* also *Planned Parenthood*, 941 F.2d at 827.

Three years later, an en banc panel of this Circuit decided a similar school "imprimatur" case in *Planned Parenthood*, 941 F.2d 817. The case involved school educators' refusals to accept advertisements for *Planned Parenthood* in student newspapers, yearbooks, and athletic programs. *Id.* at 819. Like *Hazelwood*, *Planned Parenthood* dealt with an issue of school sponsorship. *Id.* Also like *Hazelwood*, the *Planned Parenthood* court decided that the school had created only a nonpublic forum in its acceptance of advertisements. *Id.* at 825.

Despite the absence of express "viewpoint neutrality" discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated "viewpoint neutrality"

analysis into nonpublic forum, school-sponsored speech cases in our Circuit.[2] *See id.* at 828 n. 19, 829-30. But *see Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir.1992) (indicating in dicta, without any mention of "viewpoint neutrality," that *Hazelwood* holds that "federal courts are to defer to a school's decision to suppress or punish vulgar, lewd, or plainly offensive speech, and to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school,

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[2] We note that the circuits are currently split on this question. Compare *C.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir.) ("*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns. . . . [T]he requirement of viewpoint neutrality, while essential to the analysis of a school's restrictions on extracurricular speech . . . is simply not applicable to restrictions on the State's own speech."), reh'g en banc granted, opinion vacated, 197 F.3d 63 (1999), and *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir.1993) ("[T]he court in [*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral."), with *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir.) (stating, curiously, that *Hazelwood* "noted" that non-viewpoint-based restrictions were part of its analysis), reh'g granted, opinion vacated, 197 F.3d 828 (1999), and *Searcey v. Harris*, 888 F.2d 1314, 1319 & n. 7 (11th Cir.1989) ("*Hazelwood* . . . does not alter the test for reasonableness in a nonpublic forum such as a school but rather provides the context in which the reasonableness of regulations should be considered. . . . [T]here is no indication that the [*Hazelwood*] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."); *id.* at 1325 ("Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.").

when the decision is 'reasonably related to legitimate pedagogical concerns.' "). Thus, were Downs's case a case of school-sponsored or imprimatur speech in a nonpublic forum – as the district court concluded – we would necessarily be compelled by *Planned Parenthood* to review LAUSD's actions through a viewpoint neutrality microscope.

Viewpoint neutrality, however, does not apply to LAUSD's actions in this case. This case is not controlled by *Hazelwood* or *Planned Parenthood* because it is a case of the government itself speaking, whether the government is characterized as Leichman High, LAUSD, or the school board. It is not a case involving the risk that a private individual's private speech might simply "bear the imprimatur" of the school or be perceived by outside individuals as "school-sponsored." Rather than focusing on what members of the public might perceive Downs's speech to be, in this case we find it more helpful to focus on who actually was responsible for the speech on Leichman High's Gay and Lesbian Awareness bulletin boards.

Only school faculty and staff had access to post materials on these boards. While these faculty and staff members may have received materials from outside organizations, the faculty and staff members alone posted material on the bulletin boards, and at all times their postings were subject to the oversight of the school principals. Although much, if not all, of what Downs posted appeared on the bulletin board directly across the hall from his assigned classroom, the proximity of the board to his classroom detracts in no way from the conclusion that the bulletin board, like all others in Leichman High's halls, were the property and responsibility of Leichman

High and LAUSD. That Leichman High's principals do not spend the majority of their days roaming the school's halls strictly policing – or, in Downs's point of view, censoring – the school's bulletin boards does not weaken our conclusion that there is no genuine issue of material fact concerning whether Olmsted and Marino had the authority to enforce and give voice to school district and school board policy. Inaction does not necessarily demonstrate a lack of ability or authority to act.

No admissible evidence refutes Olmsted's and Marino's assertions that they had authority over the bulletin boards' content at all times. Downs submitted a declaration from Earnest Scarcelli, formerly employed as a principal by LAUSD. Scarcelli stated that he had "no recollection of any unwritten district-wide policy that states that whenever a principal permits something to remain posted or displayed on bulletin boards, display cases or classrooms [sic] the material becomes officially approved by the district." Scarcelli also "believe[d] that it would be impossible for the principal of a large school to constantly keep track of bulletin boards, to the extent that if something were go [sic] unnoticed and be displayed for a period of time that it would necessarily become officially approved by the district." Scarcelli's declaration does not create a triable issue of fact on the authority of school principals as site administrators of school district policy. According to Mr. Scarcelli, he retired as an LAUSD school principal as of 1992, well before the relevant events underlying this case. Thus, his declaration is of no value whatsoever, evidentiary or otherwise.

Olmsted's and Marino's implicit acceptance of other material posted by school faculty and staff that remained

on the bulletin boards was equivalent to Leichman High, LAUSD, and the school board itself speaking. Cf. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. . . . Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."). Conversely, Olmsted's and Marino's explicit rejection of Downs's posted adversarial materials was equivalent to Leichman High, LAUSD, and the school board itself either choosing not to speak or speaking through the very act of removal. The important point is that any speech on the bulletin boards was directly traceable to LAUSD and the school board through Olmsted's and Marino's enforcement of LAUSD and school board policy.

Because the school district and the school board were in fact responsible for 1) the recognition of Gay and Lesbian Awareness month and 2) the content of the bulletin boards through school principals' oversight, this case is clearly distinguishable from cases involving student-written articles in a school-sponsored newspaper or an outside organization's advertisements in school-sponsored student newspapers, yearbooks, and athletic programs. *See Hazelwood*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592; *Planned Parenthood*, 941 F.2d 817; *see* also *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir.1998) (termination of teacher who allowed students to use profanity in classroom plays and poems treated as case of educators' editorial control over "school-sponsored expressive activities"); *Silano v. Sag*

Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723-24 (2d Cir.1994) (guest lecturer's showing of film including bare-chested women to tenth-grade mathematics class treated as school sponsored speech subject to *Hazelwood* analysis); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 774-76 (10th Cir.1991) (teacher's in-class comment on school rumor treated as "school-sponsored expression in a nonpublic forum"). Furthermore, unlike the University of Virginia in *Rosenberger*, there is no evidence that LAUSD made an affirmative effort to disclaim responsibility for the content of the bulletin boards. *See* 515 U.S. at 834-35, 115 S.Ct. 2510 ("The distinction between the University's own favored message and the private speech of students is evident in the case before us. . . . The University declares that the student groups eligible for [Student Activity Fund] support are not the University's agents, are not subject to its control, and are not its responsibility.").

We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth: LAUSD, by issuing Memorandum No. 111, and Leichman High, by setting up the Gay and Lesbian Awareness bulletin boards. The bulletin boards served as an expressive vehicle for the school board's policy of "Educating for Diversity." Cf. *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 993 (3d Cir.1993) ("The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take

the examinations is not prohibited by the First Amendment."), abrogated on other grounds by *Troster v. Pennsylvania State Dep't of Corrections*, 65 F.3d 1086, 1087, 1090 (3d Cir.1995). Because the bulletin boards were a manifestation of the school board's policy to promote tolerance, and because Olmsted and Marino had final authority over the content of the bulletin boards, all speech that occurred on the bulletin boards was the school board's and LAUSD's speech.

B. To What Extent Can the Government Control Its Own Speech?

Now that we have concluded that this case involves government speech in a nonpublic forum, we must decide to what extent the First Amendment allows others to interfere with it. *See Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094 n. 11 (8th Cir.2000) (refusing to decide whether speech's status as "government speech" is enough to preclude forum analysis altogether), cert. denied, ___ U.S. ___, 121 S.Ct. 49, ___ L.Ed.2d ___ (2000). We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist. As applied here, the First Amendment allows LAUSD to decide that Downs may not speak as its representative.

This power is certainly so if his message is one with which the district disagrees.

Although "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," *Rosenberger*, 515 U.S. at 828, 115 S.Ct. 2510 (emphasis added), "when the State is the speaker, it may make content-based choices." *Id.* at 833, 115 S.Ct. 2510; *see* also *Rust v. Sullivan*, 500 U.S. 173, 194-200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding federal regulations prohibiting recipients of Title X grants from promoting or advocating abortion as a method of family planning); *Knights of the Ku Klux Klan*, 203 F.3d at 1094 & n. 11 (in public broadcasting case dealing with outside organization's desire to donate funds to broadcaster and thereby mandate broadcaster's on-air recognition of such donation, stating that "[a]s speaker, [the university-public broadcaster] exercises control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves."); *Steirer*, 987 F.2d at 994, 997 ("The mere fact that [a public high school's] course content itself reflects a particular ideology does not necessarily trench upon First Amendment protections."); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir.1982) (en banc) (in the context of state-owned-and-operated public television stations, stating that "the First Amendment does not prohibit the government, itself, from speaking, norrequire the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression."). Accord *Forbes*, 523 U.S. at 674, 676-78, 682, 118 S.Ct. 1633 (after specifically indicating that public broadcaster's

broadcast was "by design a forum for political speech by the candidates," holding that broadcaster must make broadcasting decisions in viewpoint-neutral manner); *Edwards v. California Univ. of Pa.*, 156 F.3d 488, 490-92 (3d Cir.1998) (adhering to *Rosenberger*'s "content-based" language in curriculum case, but doing so in a way that allowed public university to prevent professor from "advancing [his] religious beliefs through his lectures and handouts"), cert. denied, 525 U.S. 1143, 119 S.Ct. 1036, 143 L.Ed.2d 44 (1999). *Forbes*, in fact, recognized this proposition: "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." 523 U.S. at 674, 118 S.Ct. 1633.

When the government is formulating and conveying its message, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted" by its individual messengers. *Rosenberger*, 515 U.S. at 833, 115 S.Ct. 2510. For example, a government's administration will not just make a decision to talk about taxes. It will have a viewpoint on the utility of taxes, and there is no constitutional reason why it should not be able to convey that message with clarity. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects – which is the main reason we have decided to elect those who run the government, rather than save money

by making their posts hereditary. . . . None of this has anything to do with abridging anyone's speech.").

An arm of local government – such as a school board – may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives. Cf. *Rust*, 500 U.S. at 194, 111 S.Ct. 1759 ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."). *Rosenberger* supports this notion. Shortly after the Court stated that the government may make "content-based choices" as speaker, the Court also declared, with reference to the facts of that case, that "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech which is controlled by different principles." *Rosenberger*, 515 U.S. at 834, 115 S.Ct. 2510 (citing, among others, *Hazelwood*); *see* also *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 1357, 146 L.Ed.2d 193 (2000) ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different [from traditional viewpoint neutrality analysis].").

At oral argument, Downs asserted that his case is indistinguishable from *Rosenberger* because, he alleges,

LAUSD invited a variety of viewpoints on gay and lesbian issues. Downs, of course, is correct in his argument that his postings "focused on gay and lesbian issues," as contemplated by Memorandum No. 111. If we myopically limited Memorandum No. 111's message to that phrase, we might agree with Downs that this case would be indistinguishable from *Rosenberger* as inviting a myriad of viewpoints on a single topic of discussion, and thus requiring forum analysis. *See* 515 U.S. at 824, 837, 115 S.Ct. 2510 (striking down university's decision not to subsidize publications with religious editorial viewpoints in light of a university mandate making such subsidies available to all student organizations "related to the educational purpose of the University"). However, that Downs's postings did indeed "focus on gay and lesbian issues" does not mean that they satisfied all aspects of LAUSD's policy as announced in Memorandum No. 111.

In addition to inviting a "focus on gay and lesbian issues," Memorandum No. 111 made clear that it was "the District's multicultural and human relations education policy" to "Educat[e] for Diversity," and that this included the expectation that all students would be given equal access to a quality education and the academic and social activities of the school. The policy also made clear a focus on "foster[ing] a climate that reduces fears related to difference and deters name-calling and acts of violence or threats motivated by hate and bigotry." In LAUSD's view, Downs's contributions to the bulletin boards harmed, rather than helped, the promotion of tolerance for and appreciation of diversity.

Moreover, Downs had notice that he was not dealing with a situation in which the government had opened up

a forum inviting private speech and debate. In fact, Downs had continuous notice that he was violating district policy, even if he could successfully argue that Memorandum No. 111 was ambiguous regarding what it allowed him to contribute to Gay and Lesbian Awareness month in the school. Olmsted and Marino, as representatives of the elected school board, informed him that he was not conveying the government's chosen message, and that as long as he was employed by LAUSD, he was expected to adhere to the district's policy. Estrada-Melendez, LAUSD's legal counsel, informed Downs that the bulletin boards were not "free speech zones."

Were we to invoke the Constitution to protect Downs's ability to make his voice a part of the voice of the government entity he served, Downs would be able to do to the government what the government could not do to Downs: compel it to embrace a viewpoint. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (striking down state criminal law forbidding New Hampshire citizens from covering up state motto "Live Free or Die" on license plates as violative of "right to refrain from speaking"); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating school board resolution requiring teachers and students to participate in flag salute). Indeed, not only would the government be compelled to speak, but

Downs's citation to passages from the Bible might present Establishment Clause problems.

Our narrow decision does not conflict with the Supreme Court's plurality decision in *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). *Pico* dealt with a school district's decision to remove several books from a school library. *Id.* at 856-58, 102 S.Ct. 2799; *see* also *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028-31 & n. 13 (9th Cir.1998) (student's First Amendment rights violated by removal – because of threats of damages, lawsuits, and other forms of retaliation – from mandatory reading list of books determined by the school district to have legitimate educational value); *Pratt v. Independent Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 773 (8th Cir.1982) (school board's removal of material from classroom curriculum based solely on material's message is unconstitutional). In *Pico*, the court made clear at the outset that the respondents in that case did not seek

> to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are library books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.

Pico, 457 U.S. at 862, 102 S.Ct. 2799. Thus, when the Court held that local school boards could not remove books from school library shelves simply because they disliked the ideas contained in the books, *id.* at 872, 102 S.Ct. 2799,

the Court was not faced with a case of "school board speech" or "government speech." Instead, the Court declared, the school board's "duty to inculcate community values" was misplaced as a defense in that case where the board "attempt[ed] to extend [its] claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." *Id.* at 869.

Whether or not the bulletin boards by themselves may be characterized as part of the school district's "curriculum" is unimportant, because curriculum is only one outlet of a school district's expression of its policy. Nevertheless, our decision is consistent with cases holding that school teachers have no First Amendment right to influence curriculum as they so choose. *See*, e.g., *Edwards*, 156 F.3d at 491-92 (holding that professor has no First Amendment right tocompel university to allow him to teach class from religious perspective); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370-71 (4th Cir.1998) (en banc) (teacher's choice of play not constitutionally-protected speech); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir.1990) (holding that teacher has no First Amendment right to employ classroom teaching methodology of choice); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir.1989) (teacher's choice of supplemental reading list not constitutionally-protected speech); *see* also *Monteiro*, 158 F.3d at 1030 n. 13 ("Although the complaint does not refer to the involvement of teachers in the teaching of the literary works at issue or in the formation of the curriculum, it is likely that claims such as these, and their outcomes, could have

significant effect on the First Amendment rights of teachers.").

In order for the speaker to have the opportunity to speak as the government, the speaker must gain favor with the populace and survive the electoral process. *See Southworth*, 120 S.Ct. at 1357 ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."). The LAUSD school board is elected by the public, and until its current members are voted out of office, they "speak" for the school district through the policies they adopt. Furthermore, in the case of the typical school board, influence from the community does not end at the ballot box, but continues through publicly-held school board meetings at which parents and other interested parties may express satisfaction or dissatisfaction with the school board's policies or "speech." This is reflected in this case by Memorandum No. 111's acknowledgment that community groups had participated in a review of the posters and materials LAUSD sent to each of the schools for Gay and Lesbian Awareness month.

The district court in this case noted that "[j]ust as a school could prohibit a teacher from posting racist material on a bulletin board designated for Black History Month, [LAUSD] may prohibit [Downs] from posting intolerant materials during 'Gay and Lesbian Awareness Month.' " The Supreme Court has recognized a similar principle in the context of the government's ability to regulate its employees' speech and discipline those

employees for that speech. In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Court noted that the "State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568, 88 S.Ct. 1731 (1968).

Our holding, however, does not prevent Downs from propounding his own opinion on the morality of homosexuality. Subject to any applicable forum analysis, he may do so on the sidewalks, in the parks, through the chat-rooms, at his dinner table, and in countless other locations. Cf. *Rust*, 500 U.S. at 198, 111 S.Ct. 1759 ("Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project."); *Edwards*, 156 F.3d at 491 ("[A]lthough Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom."). He may not do so, however, when he is speaking as the government, unless the government allows him to be its voice.

Conclusion

We hold that when the school district speaks through bulletin boards that are not "free speech zones," but instead are vehicles for conveying a message from the school district, the school district may formulate that

message without the constraint of viewpoint neutrality. Here, LAUSD, an arm of local government, is firmly policing the boundaries of its own message. As such, LAUSD did not violate Downs's First Amendment free speech rights. Because we determine that Downs has no First Amendment right to speak for the government, his equal protection claim based upon the deprivation of this asserted right also fails to withstand summary judgment.

The district court's grant of summary judgment in favor of LAUSD is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT DOWNS, Plaintiff, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant.	No. CV 98-9876-SVW (AJWx) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Sept. 17, 1999) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. Introduction

This case presents the question of whether, during the school's "Gay and Lesbian Awareness Month," a public high school may preclude a teacher from posting material critical of homosexuals on his classroom bulletin board. Because a public school has broad discretion over speech on matters within its legitimate curriculum, the Court concludes that the school may preclude a teacher's anti-homsexual [sic] speech on classroom bulletin boards.

Plaintiff Robert Downs works as a teacher at Diane S. Leichman High School in the Defendant Los Angeles Unified School District. That school, among others, designated June of each year "Gay and Lesbian Pride Month." The school contains a number of bulletin boards upon which teachers and other school personnel may post materials. The school district contends that it permits the posting of materials "which explain or illustrate the

Board of Education's duly established curriculum of tolerance and understanding of the diverse lifestyles in its community."

Plaintiff claims that while other school employees posted a variety of materials on the boards, the school removed his materials which provided an alternate view to what Plaintiff saw as the "promotion" of the gay and lesbian lifestyle. Plaintiff thus seeks, under the Federal and California Constitutions, a permanent injunction against the enforcement of school policies against Plaintiff's rights to speech, a declaratory judgment, compensatory damages, and attorney's fees.

Earlier in this litigation, Defendant moved for summary judgment based on the principle that, based on legitimate pedagogical concerns, a school may regulate speech which might appear to bear the school's imprimatur. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In an Order dated April 22, 1999, the Court agreed with Defendant's legal contentions. However, the Court denied summary judgment at that time because of the lack of evidence in the record related to the materials actually on various bulletin boards at Leichman High School. Without knowing the specifics of the Plaintiff's speech or the range of speech tolerated by the Defendant, the Court could not evaluate whether Defendant's conduct fell within the discretion allotted to it.

After further discovery and a substantial enlargement of the record before this Court, Defendant renewed its motion for summary judgment. For the reasons discussed below, the Court now GRANTS Defendant's motion for summary judgment.

II. Analytic Overview

The case rasies [sic] a number of interrelated analytic questions. To assist in comprehending the relationship between those questions, the Court will first lay out in summary fashion an overview of its central findings. The Court will then discuss in greater depth the reasons for each of those findings.

As a threshold matter on the undisputed facts of the case, the Court finds that the bulletin boards in question are not public fora, but are rather non-public fora which are under the school's proprietary control. On the undisputed facts of the case, the Court also concludes that the relevant forum for analysis is Plaintiff's high school.

The Court next finds as a matter of law that schools have broad discretion in controlling speech on matters within their pedegogical [sic] mission. The Court finds as a matter of law that schools may include tolerance as part of a legitimate pedegogical [sic] approach.

Finally, after reviewing both the materials posted at Plaintiff's school and a wide variety of materials from other schools, the Court concludes that no reasonable fact-finder could determine that the school district exceeded its broad discretion in implementing its legitimate pedegogical [sic] approach.

II. Analysis In Depth

A. Summary Judgment Standard

The Court may grant summary judgment when the record reveals that there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). The burden is on the moving party to establish both the nonexistence of a genuine issue of fact and that it is entitled to judgment. *Id.* The burden then shifts to the non-moving party to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 323-24. The non-moving party cannot rest on the allegations and denials in the pleadings, but must set forth specific facts establishing an issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Defining the Proper Forum

Plaintiff argues that the relevant forum consists of all of the schools in Defendant school district. Defendant argues that the relevant forum is limited to the high school at which Plaintiff works, Leichman High. Because the parties did not brief this issue as part of the original summary judgment motion, the Court instructed Defendant to provide discovery for a wide range of schools during the course of these proceedings.

At this point, however, the Court must evaluate the issue of the relevant forum. As discussed below, the Court finds that the relevant forum is limited to Leichman High.

The Supreme Court has instructed that the access sought by a plaintiff defines the relevant forum. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 800-01 (1985). Several Circuits have followed this approach in cases similar to this one. In *Air Line Pilots Assoc. v. Department of Aviation of City of Chicago*, 45 F.3d

1144, 1151-52 (7th Cir. 1995), the Seventh Circuit followed *Cornelius* and determined that because the plaintiffs sought access to one display case, not the greater airport concourse, the relevant forum consisted only of that one display case. In *Lebron v National Railroad Passenger Corp.*, 69 F.3d 650, 655-56 (2d Cir. 1995), the Second Circuit, based on the access sought by plaintiffs, decided that the relevant forum included only one billboard, not all of the billboards, in Penn Station.

Plaintiff cites *Christ's Bride Ministries v. Southeastern Pennsylvania Transportation Authority* to support his argument that the relevant forum should consist of all of the schools in Defendant school district. 148 F.3d 242 (3d Cir. 1998). *Christ's Bride* does not provide a basis for that argument. Instead, the *Christ's Bride* court looked to the access sought by the speaker and concluded that the forum only consisted of leased advertising space in the public transit system, not the ability to leaflet, demonstrate, or solicit in the stations as a whole. *Id.* at 248.

In this case, Plaintiff sought access to the bulletin board outside his classroom and claims disparate treatment from other teachers at his school. Accordingly, based on *Cornelius*, the relevant forum in this case is limited to Diane S. Leichman High School, not the entire Defendant school district.[1]

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[1] As noted above, Plaintiff received a sizable amount of discovery from other schools in Defendant district. The Court's holding with respect to the forum makes that material irrelevant. However, as the Court will detail infra, the Court has examined all of the material in the record – regardless of the school from which it originates – and the Court finds that none

C. Identifying the Type of Forum

Plaintiff contends that the school bulletin boards amount to a limited public forum because the school invites teachers and other employees to post material. The court rejects this contention. As the Ninth Circuit has explained,

> *Hazelwood* teaches that "school facilities may be deemed to be public forum only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations." If, on the other hand, school facilities have been reserved for other intended purposes, "communicative or otherwise," no public forum will have been created and reasonable restrictions on speech may be imposed.

Planned Parenthood v. Clark County School District, 941 F.2d 817, 822 (9th Cir. 1991) (en banc) (citations omitted).

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of the evidence reveals inappropriate action by the school district.

Plaintiff does object under Rule 56(f) that additional material remains unproduced from other schools in Defendant district. However, as discussed below, the Plaintiff provides no evidence that the sizable discovery received thus far is unrepresentative. Put differently, the Plaintiff provides no reason to believe that additional discovery will reveal material of a different character than the material reviewed by the Court. Given that a complete reconstruction of every bulletin board in every school is likely impossible to begin with, the Court would not require further discovery even if such discovery were relevant.

Both *Hazelwood* and *Planned Parenthood* rejected the arguments that school newspapers constituted limited public fora – even when, in *Planned Parenthood*, the papers solicited outside advertising. In this case, the undisputed evidence clearly shows that the school only allowed school employees to post material on the bulletin boards. The record contains no evidence that the school invited students or any member of the public to post materials on the bulletin boards.[2] Thus, as in *Planned Parenthood*, the Court "conclude[s] that the record fails to reveal the requisite 'clear intent to create a public forum' *Hazelwood* requires." 941 F.2d at 825 (quoting *Hazelwood*, 484 U.S. at 270).

In sum, there is no evidence that the bulletin boards are limited public fora, and the Court finds that they are not.

D. Legitimate Pedagogical Interest

After the Supreme Court found in *Hazelwood* that the school newspaper did not constitute a public forum, the Court focused on whether or not the expression was school-sponsored speech. *See Hazelwood*, 484 U.S. at 270-73. The Court distinguished the situation in *Hazelwood* from *Tinker v. Des Moines Indep. Community School*

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[2] Plaintiff strenuously objects to this conclusion because the record reflects that school officials sometimes posted materials provided to them by students or outside organizations. Plaintiff misunderstands a fundamental distinction, however: only school employees posted material. Even if some of the material came from outside sources, those outside sources did not have access to the forum.

Dist., 393 U.S. 503 (1969), a case in which the Court faced a school's opposition to students' choice to wear black armbands, by considering the authority of school officials "over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Where the speech might bear the imprimatur of the school, the Court explained that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

In its previous consideration of Defendant's summary judgment motion, the Court determined that Plaintiff's expression fit the definition of school-sponsored speech as defined by *Hazelwood*. *See* April 22, 1999 Order. For the sake of clarity, the Court will again set out its reasoning.

1. Hazelwood Applies to This Case

Plaintiff's speech falls within the realm of school-sponsored speech.[3] While *Hazelwood* arose out of student

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[3] Plaintiff does not dispute that Defendant's action in this case relates to its curriculum. *See, e.g., Hazelwood*, 484 U.S. at 271; *Silano v. Sag Harbor Union Free School Dist.*, 42 F.3d 719, 723 (2d Cir. 1994) (explaining that activities "supervised by faculty members and designed to impart particular knowledge or skills to student participants" fall within the ambit of curriculum) (quoting *Hazelwood*).

speech through the school newspaper, the Court explained that its test applied to

> educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

484 U.S. at 271. Although Plaintiff's speech did not occur within the confines of his classroom, it occurred on bulletin boards maintained by the school on school premises immediately outside of his classroom. In addition, his speech related to educational goals of the school and a recently designated "Gay and Lesbian Awareness Month." The Court finds that the undisputed evidence shows that the speech at issue could reasonably be perceived to bear the imprimatur of the school. *See, e.g., Miles v. Denver Public Schools*, 944 F.2d 773, 776-77 (10th Cir. 1991) (applying *Hazelwood* to classroom comments of a teacher that did not relate in any way to the lesson plan).[4]

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[4] The Court recognizes the Fourth Circuit's recent decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (en banc), which suggests that teachers have no First Amendment right to control the school's curriculum. Defendant does not urge the application of this recent case, and the Court does not reply upon it.

2. The Reasonableness of Defendant's Actions

Because Plaintiff's speech clearly falls within the ambit of *Hazelwood*, the Court must now determine whether or not Defendant's justification for removing Plaintiff's material from the bulletin board was reasonable.[5] This Court reviews Defendant's decision with "substantial deference." *Planned Parenthood*, 941 F.2d at 829.

The Court first notes that Defendant's professed interest certainly survives scrutiny under *Hazelwood*.[6]

Where (as here) the professed interest is a legitimate pedagogical interest, school authorities have a wide discretion in how to pursue this interest. *Hazelwood* explained that school authorities have legitimate educational interests in assuring that "participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be

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[5] The Court could not make this determination at the time of the April 22, 1999 Order due to the limited nature of the record.

[6] Defendant based its decision to teach "tolerance" on a number of alarming statistics regarding the incidents of abuse against gay students in secondary schools and the suicide rate by such students. For a review of such evidence, see Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 Brook. L. Rev. 1599 (Winter 1995).

In addition, the Supreme Court has explained that public education "must inculcate the habits and manner of civility as values in themselves." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted). Attempting to foster a "congenial academic environment" also constitutes a legitimate pedagogical concern. *Silva v. University of New Hampshire*, 888 F. Supp. 293, 313 (D. N.H. 1994).

inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271. A "school's decision not to promote or sponsor speech that is unsuitable for immature audiences, or which might place it on one side of a controversial issue, is a judgment call which *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference." *Planned Parenthood*, 941 F.2d at 829. *See also Conward v. Cambridge School Committee*, 171 F.3d 12, 23 (1st Cir. 1999) (noting that "school officials have broad discretion to restrict school speech in order to further educational goals"); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 527 (9th Cir. 1992) (stating that "[d]espite the fact that the suppression of speech has obvious First Amendment implications, courts are not necessarily in the best position to decide whether speech restrictions are appropriate").

The undisputed evidence demonstrates that Plaintiff attempted to post a variety of materials demonstrated an opposition to homosexuality. *See, e.g.*, Defendant's Memorandum of Points and Authorities, Filed July 1, 1999, at 3-4. Defendant determined that Plaintiff's material would threaten the school's mission of teaching tolerance of gays and lesbians. No reasonable fact finder could conclude that the school district exceeded its broad discretion in coming to this determination.

While the Court's research did not reveal any case directly analogous to this one, a number of other courts have approved similar actions by school districts under the *Hazelwood* approach. *See, e.g., Lacks v. Ferguson Reorganized School Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998)

(considering "too plain for argument" that prohibiting profanity in a creative writing class amounts to a legitimate pedagogical interest; *Steirer v. Bethlehem Area School Dist.*, 987 F.2d 989, 993-94 (3d Cir. 1993) (approving school community service requirement as part of the curriculum and explaining that the "gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment"); *Miles*, 944 F.2d at 778 (holding that school acted reasonably in reprimanding teacher for classroom speech that invaded student privacy); *Crosby v. Holsinger*, 852 F.2d 801, 802-03 (4th Cir. 1988) (affirming principal's elimination of school mascot because it offended black students and limited their participation in school activities and noting that "[e]xcept to make the rough threshold judgment that this decision has an educational component, we will not interfere").

Plaintiff argues that Defendant did not act reasonably in removing Plaintiff's material from the bulletin board. Instead, Plaintiff claims that Defendant discriminated based on viewpoint because Plaintiff's views did not comport with the message that the school board tried to convey. Plaintiff contends that Defendant allowed other employees to place materials on the bulletin boards which advocated the gay or lesbian lifestyle but removed Plaintiff's speech critical of the gay and lesbian lifestyle.

As an initial matter, the Court notes that existing caselaw does not clearly explain to what degree, if at all, schools may prohibit speech based on "viewpoint." The traditional approach holds that "[c]ontrol over access to a

nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Planned Parenthood*, 941 F.2d at 829 (quoting *Cornelius*, 473 U.S. at 806). The Eleventh Circuit recognized this problem shortly after *Hazelwood* and concluded that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989).

More recently, however, the Supreme Court provided a cryptic reference that suggests that viewpoint discrimination is permissible in the school context. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court recognized that while, when the government acts as the speaker it "is entitled to say what it wishes,"

> It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. [citing, among others, *Hazelwood*]

115 S. Ct. 2510, 2519 (1995).

As the Supreme Court appears to have recognized, the traditional discussions of viewpoint discrimination do not fit well into the analysis of a school's decision to

prohibit student or teacher speech related to the curriculum. The Supreme Court's formulation of the "legitimate pedagogical interest" test in *Hazelwood* allows schools to prohibit speech which conflicts with the school's interest. Just as a school could prohibit a teacher from posting racist material on a bulletin board designated for Black History Month, Defendant may prohibit Plaintiff from posting intolerant materials during "Gay and Lesbian Awareness Month." Defendant's decision to teach tolerance by, in part, pointing to successful gay individuals is a reasonable pedagogical choice. Although reasonable minds may select different methods of conveying tolerance, the Court must defer to the choices of the school district where they clearly constitute educational decisions best made by professional educators.

In addition, Plaintiff provides no evidence that Defendant engaged in any viewpoint discrimination by allowing speech which "advanced" the gay lifestyle but disallowing speech which rejected that lifestyle. The undisputed evidence shows that at Diane S. Leichman High School, and, in fact, throughout Defendant school district, teachers and school officials posted materials which complemented Defendant's mission of teaching tolerance.[7] This material consisted of, to name a few, the

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[7] As noted above, the only relevant forum for this dispute is Diane S. Leichman High School. However, because the parties had not briefed the forum question, the Court allowed discovery from other schools in the district (including elementary schools and junior high schools). Relevant evidence from many of these schools has been included in the record, and the court has reviewed all of this evidence. Even if the Court were to consider this evidence, it would not raise a triable issue

history of civil rights movements, an explanation of certain symbols associated with homosexuality (such as the rainbow flag, the pink triangle, and the lambda symbol), descriptions of successful gay individuals, and articles denouncing bigotry. *See* Defendant's Motion for Summary Judgment, Filed July 1, 1999. Defendant also provided two declarations – one from the current principal of Leichman High School, Joseph P. Marino, and one from the past principal, Donna Olmsted. Those declarations state that each principal reserved the bulletin boards "for the posting of material which announced, explained, promoted, fostered, or otherwise complemented the educational curriculum, the instructional program, or the pedagogical policies and practices established or otherwise approved by the Board of Education." Declaration of Marino at ¶6.

Plaintiff submitted a list of Defendant's exhibits which he felt clearly crossed the line into advocacy instead of merely teaching tolerance. *See* Plaintiff's Exhibits Supporting Petition, Filed July 27, 1999. The Court examined all of these materials; all of the materials unmistakably fall within the scope of the school's legitimate pedagogical interest. *See* Defendant's Exhibits 498, 512, 517, 531 (listing parties and gatherings of gay individuals); Exh. 549 (an advertisement for ordering back issues of a particular gay magazine); Exhs. 336, 598, 603 (noting the existence and contact information for gay and lesbian support and counseling groups); Exh. 508 (noting

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of fact with respect to Defendant's pursuit of a legitimate pedagogical interest.

the issue of gay participation in the military); and Exh. 1101-03 (issues of a magazine called the Lesbian News).[8]

Defendant School district believes that information of the sort described above raises awareness on the part of students and provides information for students to learn more about gay and lesbian issues. Regardless of the effectiveness of Defendant's choice, it is clear that Defendant made the choice based on factors reasonably related to a legitimate pedagogical interest.[9]

Plaintiff also argues that because he did not receive complete discovery with respect to all of the schools in Defendant district, the Court cannot grant Defendant's motion for summary judgment. *See* Federal Rule of Civil Procedure 56(f). The Court disagrees. First, the relevant forum is Leichman High School and Plaintiff does not contend that he has not received all of the materials still in existence from that source. Second, Plaintiff has no basis to think that any other relevant evidence exists.

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[8] Most, if not all, of the listed exhibits are from schools other than Leichman High.

[9] Plaintiff argues that certain pages of materials posted on bulletin boards, such as internal pages of "The Lesbian News," contain inappropriate information or even show individuals in a relative state of undress. However, those exhibits were not posted at Leichman High School, nor does Defendant district need to maintain a state of perfect vigilance with respect to every page on every bulletin board. Plaintiff does not demonstrate that anyone brought that particular page to the attention of a principal or even that those pages are inappropriate in the overall context of the display. This, too, is a matter left to the discretion of Defendant district provided that the overall project is reasonably related to a legitimate pedagogical interest.

Plaintiff cannot identify any specific items which were placed on boards or display areas in any other school.[10] The school district has provided a very sizable amount of discovery from other schools, and Plaintiff simply presents no reason to believe that this discovery is not representative. Given the virtual impossibility of recreating every bulletin board on every school in the Los Angeles Unified School District, the Court would not order additional discovery even if relevant unless there were some reason to believe that the additional discovery was likely to add something new to the case. Given the fact that no piece of the extensive discovery reveals any reason to question Defendant's policies and practices during Gay and Lesbian Awareness Month, the Court rejects Plaintiff's argument based on Rule 56(f) as unjustified and unsupported.

In sum, the undisputed evidence demonstrates that Defendant followed a consistent policy of attempting to teach its students tolerance of gays and lesbians. The

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[10] In addition, Plaintiff's designation of exhibits demonstrates a clear misunderstanding on Plaintiff's part of what might amount to impermissible conduct by Defendant. For instance, Plaintiff points to the following exhibits as allegedly demonstrating an illegitimate, non-pedagogical interest: Exhibit 1053a, a flyer titled "Homophobia: What you may not know" which states that "All of society suffers when we allow any group to be degraded. Education is our most powerful tool"; Exhibit 387, an editorial from the Los Angeles Times written by former President Jimmy Carter titled "It's fundamentally Christian to Reject Politics of Hate" and subtitled "No one should condone, even by silence, the persecution of homosexuals"; and Exhibit 395, a poster urging individuals to recognize homophobia and respect gay men and women.

school officials at Leichman High School removed from the school's bulletin boards Plaintiff's materials because they undermined that purpose. The undisputed evidence shows that Defendant exercised its broad discretion and took this action in a manner reasonably related to a legitimate pedagogical interest and the Court will not interfere with that decision. Accordingly, the Court GRANTS Defendant's motion for summary judgment.

III. Plaintiff's Motion to File an Amended Complaint

On July 23, 1999, three days after the scheduled trial date and after the Court held the pretrial conference at which the Court again considered the motion for summary judgment, Plaintiff filed a motion for leave to file an amended complaint. Plaintiff's supporting materials argued that, based on discovery to that point, Plaintiff had decided to file a class action complaint against the actions throughout the Defendant district. Defendant countered that Plaintiff's amended complaint would require a vast amount of new discovery and essentially begin an entirely new lawsuit. Defendant also claimed that Plaintiff's amended complaint would lead to undue delay and prejudice to Defendant.

Rule 15 of the Federal Rules of Civil Procedures states that a party may amend at this stage in the proceedings by leave of the court or consent of the adverse party, but in any event when justice so requires. While the Court recognizes the liberal policy in favor of amendments, the Court agrees with Defendant that an amendment at this stage of the proceedings would prejudice Defendant and not serve the ends of justice.

Plaintiff's proposed amendment involves changing the complaint from a single Plaintiff with one central federal Constitutional claim to a class action, governing the entire Defendant district and its hundreds of schools instead of just Leichman High School, with a number of state and federal claims. This change would necessitate an exponential increase in discovery and raises entirely new issues. In fact, the analysis on even the original First Amendment issue could change with the amended complaint because the interests of the school district may change with the age and sophistication of the students. The Ninth Circuit has held that this sort of prejudice justifies denying Plaintiff leave to file an amended complaint. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Crawford v. Gould*, 56 F.3d 1162, 1169 (9th Cir. 1995); *Jackson v. Bank of Hawai'i*, 902 F.2d 1385, 1387-88 (9th Cir. 1990); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

In addition, although not dispositive, the Court notes that Plaintiff waited a significant period of time before attempting to file the complaint. This raises the possibility that Plaintiff had a dilatory motive in requesting leave to amend. Plaintiff filed the original complaint on December 9, 1998. The Court scheduled a trial date for July 20, 1999 but ultimately vacated the date on the eve of trial to further consider Defendant's motion for summary judgment. Plaintiff did not file the motion to amend the complaint until three days later. While Plaintiff claims that further discovery provided the basis for the complaint, the Court notes that Plaintiff had access to all of

the relevant information in December.[11] Instead, the Court suspects that Plaintiff attempted to file the new, lengthy complaint in an effort to avoid the entry of summary judgment. Delay, especially for a dilatory purpose, also supports the denial of leave to file an amended complaint. *Swanson v. United States Forest Service*, 87 F.3d 339, 345 (9th Cir. 1996); *Jackson*, 902 F.2d at 1388; *Morongo*, 893 F.2d at 1079. Accordingly, the Court DENIES Plaintiff's motion for leave to file an amended complaint.

IV. Conclusion

For all the reasons outlined above, the Court DENIES Plaintiff's motion for leave to file an amended complaint and GRANTS Defendant's motion for summary judgment.

IT IS SO ORDERED.

DATED: 9/15/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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[11] Plaintiff knew at that time that Defendant had instituted a Gay and Lesbian Awareness Month and that teachers posted material on the topic throughout the district. Discovery only confirmed what Plaintiff already knew: schools allowed teachers to post material consistent with the district's pedagogical interest.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT T DOWNS, Plaintiff-Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant-Appellee.	No. 99-56797 D.C. No. CV-98-09876-SVW ORDER (Filed Oct. 20, 2000)

Before: TROTT, FERNANDEZ, and McKEOWN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.